

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

EDDIE HUGHES

PLAINTIFF

VS.

CIVIL NO. 4:04CV221-P-D

DR. JOHN BEARRY, ET AL

DEFENDANTS

REPORT AND RECOMMENDATION

On December 2, 2004, plaintiff, an inmate of the Mississippi Department of Corrections, appeared before the court for a hearing pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) to determine if there exists a justiciable basis for his claim filed pursuant to 42 U.S.C. §1983.

Plaintiff, a diabetic, complains that while he was in hospital at Unit 42 Defendant Nurse Johnson clipped the top of his toe while cutting his nails. The toe became infected and his left leg was amputated as a result.

The actions complained of constitute negligence on the part of Johnson. Negligence is a state, not federal, cause of action. The mere claim of negligence on the part of prison officials in administering prison policies is not cognizable under §1983. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 414 U.S. 344 (1986). *Hare v. City of Corinth, MS*, 74 F.3d 633, 647-648 (5th Cir. 1996).

Accordingly it is recommended that this case be dismissed without prejudice to allow plaintiff to refile in state court if he so desires.

The parties are referred to 28 U.S.C. 636(b)(1) and Local Rule 72.2(D) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed finding and recommendations contained in this report within ten

days from the date of filing will bar an aggrieved party from challenging on appeal both the proposed factual findings and the proposed legal conclusions accepted by the district court *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Plaintiff is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the court within ten days of this date. Plaintiff is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under F.R.Civ.P. 41(b) for failure to prosecute and for failure to comply with an order of the court.

Respectfully submitted, this 13th day of December, 2004.


UNITED STATES MAGISTRATE JUDGE